

**EDWARD H. ROBERTS**  
Claimant

**MIDWEST MINERALS, INC.**  
Respondent

**BUILDERS ASSOC. SELF INSURERS  
FUND OF KANSAS**  
Insurance Carrier

Docket No. 1,028,985

On September 13, 2010, the Kansas Supreme Court denied respondent's Petition for Review in the above referenced case. Thus, the Court of Appeals'<sup>1</sup> Order reversing the Board's decision and remanding this matter for further action must now be addressed. E. Lee Kinch, of Wichita, Kansas was appointed by the Acting Director of Workers Compensation as a Pro Tem in this matter.<sup>2</sup>

The Court of Appeals concluded that the Board erred in applying the \$50,000 compensation cap to claimant's award of benefits. Thus the Board's Order was reversed and the matter was remanded to the Board with directions to enter an award consistent with its opinion by recalculating the compensation awarded to the claimant.

<sup>1</sup> *Roberts v. Midwest Mineral, Inc.*, 41 Kan. App.2d 603, 204 P.3d 1177 (2009), *rev. denied* (Sept. 13, 2010).

<sup>2</sup> This appointment was in light of the retirement of Carol Foreman.

### APPEARANCES

Richard D. Loffswold, Jr., of Girard, Kansas, appeared for the claimant. Wade A. Dorothy, of Lenexa, Kansas, appeared for respondent and its insurance carrier (respondent).

### FINDINGS OF FACT

The Board's charge is simply to enter an Award consistent with the findings made by the Court of Appeals. Simply put, the Court of Appeals concluded that claimant's recovery was not limited by the \$50,000 statutory cap provided for in K.S.A. 44-510f(a)(4) and therefore, although the underlying findings of the Board were not challenged, its calculation of the Award was reversed. Upon this matter being remanded to the Board, the parties were requested to brief the issue. Those briefs have now been received and it is clear that there is no dispute that claimant is entitled to the maximum Award of \$100,000 for the amputation of his right arm while in the scope and course of his employment with respondent.<sup>3</sup>

There is, however, a dispute framed by the parties' filings with the Board that indicates claimant believes he is entitled to an additional sum for a "healing period".<sup>4</sup> Conversely, respondent believes the claimant's recovery is limited to \$100,000 and no further benefits are due, either as to temporary total disability benefits or for any healing period.

When this claim was presented to the ALJ, the primary dispute centered around whether claimant's recovery was limited to the \$50,000 cap set forth in K.S.A. 44-510f(a)(4) or the \$100,000 cap set forth in K.S.A. 44-510f(a)(3). And although the claimant maintains his entitlement to a "healing period", that issue was not delineated by the ALJ as an issue to be determined. Instead, the ALJ found claimant's accidental shoulder amputation resulted in a loss of a scheduled injury, which was governed by K.S.A. 44-510f(a)(4) and subject to the \$50,000 cap. Included in this Award was 3.29 weeks of temporary total disability. No mention was made of any additional award for a "healing period".

The claimant appealed this determination and presented the matter to the Board. Again, the issue of a "healing period" was not delineated as an issue to be decided.

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<sup>3</sup> Respondent's brief to the Board (dated October 26, 2010) concedes this fact. At claimant's weekly compensation rate of \$449 per week, he is entitled to 225 weeks of payments which exceeds the statutory maximum set forth in K.S.A. 44-510f(a)(3), which does apply in this instance. And because more than 225 weeks have passed since the date of claimant's accident, the entire Award is due and owing, less any sums previously paid.

<sup>4</sup> Claimants letter brief to the Board (filed Oct. 4, 2010); Respondent's Letter brief to the Board (filed Oct. 27, 2010).

Rather, the appeal centered around the statutory interpretation and interrelationship between K.S.A. 44-510f(a)(3) and (4).

The Board affirmed the ALJ's Award, capping claimant's recovery at \$50,000 and from there, the claim proceeded to the Court of Appeals. The Court's opinion unfortunately clouded the matter by indicating that claimant "received temporary total disability benefits during his healing period"<sup>5</sup>. And because claimant received temporary total disability benefits, his recovery was not based upon "functional impairment only" and therefore, his recovery was subject to the higher statutory cap of \$100,000 found in K.S.A. 44-510f(a)(3). The claim was then remanded back to the Board for the entry of an award consistent with the Court of Appeals' opinion.

The difficulty here is that the Court of Appeals has confused the concepts of temporary total disability benefits (TTD) and "healing period". TTD is defined in K.S.A. 44-510c(b)(2) as follows:

Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment.

These are designed to provide at least some wage replacement during that time while an injured worker is being treated for a work-related injury and unable to work. And when a claim is resolved, either by agreement or by award, TTD benefits are *deducted* from the ultimate sum paid to claimant.<sup>6</sup>

In contrast, benefits for a "healing period" are discretionary in cases where an amputation has occurred. K.S.A. 44-510d(b) provides for additional compensation to be awarded for a "healing period" but that period "shall not be more than 10 percent of the total period allowed for the schedule injury in question nor in any event for longer than 15 weeks."<sup>7</sup> More importantly, the entitlement to a "healing period" terminates upon return to the usual occupation. And when the ultimate award is calculated, the healing period weeks are added to the weeks to be paid based on the schedule.<sup>8</sup> But in no event can the amount awarded exceed the caps set by statute, and here, the applicable cap is \$100,000.

It is unclear from the content of the Court of Appeals' decision why they determined that the 3.29 weeks of TTD constituted a "healing period". The 3.29 weeks were, pursuant to the parties' stipulation before the ALJ, the period of time claimant remained off work immediately after his injury and received TTD benefits. After 3.29 weeks he returned to

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<sup>5</sup> *Roberts v. Midwest Mineral, Inc.*, 41 Kan. App.2d 603, 204 P.3d 1177 (2009), *rev. denied* (Sept. 13, 2010).

<sup>6</sup> K.A.R. 51-7-8.

<sup>7</sup> K.S.A. 44-510d(b).

<sup>8</sup> K.A.R. 51-7-8

work. Once he returned to his job, his entitlement to any TTD or a "healing period" ceased as he had returned to substantial gainful employment at his usual occupation.

In this instance, claimant certainly mentioned his intention to recover a "healing period" but that issue was not briefed or preserved, either before the ALJ or the Board, or for that matter, before the Court of Appeals. Claimant merely persisted in his view that he was entitled to a "healing period" in addition to any permanency. But in light of his return to work, he is not. Moreover, his Award is capped at \$100,000, inclusive of the TTD and of any "healing period" had one been awarded. Thus, the argument is academic.

Accordingly, the claimant's Award is hereby modified and claimant is entitled to the entire 225 weeks of permanent partial benefits, as per the schedule, for his amputation, as well as the 3.29 weeks of TTD, subject to the \$100,000 cap.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated October 4, 2007, is modified in accordance with the Court of Appeals Opinion. Claimant is entitled to an Award not to exceed \$100,000 for the amputation of his right arm at the shoulder level. All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

### **IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of December 2010.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Richard D. Loffswold, Jr., Attorney for Claimant  
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier  
Thomas Klein, Administrative Law Judge